



April 7, 2022

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

**Re: File Number S7-07-22
National Whistleblower Center Supports Proposed Whistleblower Program
Amendments and Encourages Robust Rewards.**

Dear Secretary Countryman:

National Whistleblower Center (“NWC”) formally submits this comment in response to the Securities and Exchange Commission’s (“SEC” or “Commission”) proposed amendments to the SEC’s whistleblower program, released on February 10, 2022.¹ This letter explains NWC’s support for the Commission’s proposed amendments to its regulations under the Securities Exchange Act of 1934 as they reflect needed improvements and corrections to outstanding issues in the September 2020 amendments.

Specifically, NWC expresses its support for amendments to: (1) SEC Rule 21F-3(b)(3) concerning whistleblower awards for “related actions”² and (2) SEC Rule 21F-6 concerning the Commission’s discretion to apply award factors and set award amounts.³

I. NWC Supports the Commission’s Proposed Amendment to Exchange Act Rule 21F-3(b) defining a “comparable” whistleblower award program for “related actions”:

A. 2020 Whistleblower Program Amendments:

Section 21F-3 of the Exchange Act requires the Commission to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws and regulations that leads to the successful enforcement of a covered action. Under Rule 21F-3(b), whistleblowers may also be eligible for awards based on amounts collected in certain “related actions” brought by certain governmental entities as set forth in Rule 21F-3(b)(1)(i)-(iv).

¹ The Commission’s Whistleblower Program Rules, 87 Fed. Reg. 9280 (proposed Feb. 10, 2022) (to be codified at 17 C.F.R. pt. 240) [hereinafter *Proposed Rulemaking*], <https://www.federalregister.gov/documents/2022/02/18/2022-03223/the-commissions-whistleblower-program-rules>.

² 17 C.F.R. § 240.21F-3(b)(3).

³ 17 C.F.R. § 240.21F-6.

However, in the September 2020 amendments to its whistleblower program, the SEC limited whistleblower award eligibility for related actions in circumstances where an alternative whistleblower program has the more “direct or relevant connection to the [non-Commission] action.” (the “Multiple-Recovery” Rule).⁴ The Commission imposed this limitation notwithstanding the clear statutory requirement that eligible whistleblowers be paid awards for both covered and related actions—without any distinction being made in the statute between the two types of actions.⁵

B. Objections to the Current Rules

As various commentators have noted, the Multiple-Recovery Rule, as currently written, violates the law, the statutory intent of the DFA, and would disincentivize whistleblowers – ultimately undermining the success of the whistleblower program.⁶

In a comment submitted during the 2020 whistleblower rulemaking, Kohn, Kohn & Colapinto, LLP, which works closely with NWC on whistleblower advocacy issues, raised the following objections to the Multiple-Recovery Rule:

1. Section 21F-3 of the Exchange Act, regarding the Commission’s requirement to pay awards, explicitly states that the Commission “shall pay” all related action awards within the mandatory 10-30% range. Thus, the Commission has no discretion to deny such awards, and cannot approve a regulation inconsistent with these statutory mandates. Thus, in reviewing any proposal impacting the related action requirements the Commission must start with a strict reading of these statutory requirements, ensuring that nothing approved conflicts with the right of otherwise qualified whistleblowers to obtain a reward of 10-30% of each and every “related action” case. Furthermore, the Commission cannot reduce the scope of proceedings covered under the “related action” definition by rule.
2. In light of the U.S. Supreme Court’s decision in *Digital Realty v. Somers*, 138 S. Ct. 767 (2018), the Commission is bound by the statutory definition and cannot approve any rule that is inconsistent with that definition.⁷ The Court held that the definitions set forth in the Exchange Act’s whistleblower law were controlling: “When a statute includes an explicit definition, we must follow that definition,” even if it varies from a term’s ordinary meaning . . . This principle resolves the question before us.”⁸ The Court also explained that “the definition section of the statute supplies an unequivocal answer” as to the meaning of specific defined terms in the Dodd-Frank Act.⁹ Thus, the Commission cannot alter the meaning of a “related action” as defined in the Act.

⁴ See SEC Rule 21F-3(b)(3)(i) through (ii).

⁵ See 15 U.S.C. § 78u-6(b).

⁶ See Eleventh Supplemental Comment on Proposed Rule 21F-3(b)(4), File Number S7-16-18, Kohn, Kohn & Colapinto, LLP (Sept. 10, 2020), <https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/09/KKC-ELEVENTH-SUPPLEMENTAL.pdf>.

⁷ 138 S. Ct. 767 (2018).

⁸ *Id.* at 776.

⁹ *Id.* at 777.

3. The Multiple-Recovery Rule creates an entirely new category of “related actions,” i.e. those covered by another whistleblower reward program. Congress was fully aware that other whistleblower reward programs existed at the time they passed the Dodd-Frank Act, and even modeled the DFA whistleblower law on the existing IRS reward law. Nowhere in the statute or the legislative history is there any support whatsoever for radically altering the Congressional definition of “related action” to include two classes of related actions.
4. The Multiple-Recovery Rule creates an exception to the Congressionally mandated related action rule that contradicts Congress’ language and has absolutely no basis in law or the legislative history. The proposed rule would give the Commission the discretion to determine which “whistleblower program has the more direct or relevant connection to the action.” The Commission has no such discretion. If a sanction issued by a sister federal or state agency meets the definition of a “related action” as clearly set forth in the statute, the monies obtained by the sister agency fall within the Dodd-Frank Act’s related action rule, period.¹⁰

Furthermore, the Commission itself has recognized that the Multiple-Recovery Rule can result in an unjust outcome for otherwise perfectly qualified whistleblowers. As the Commission noted, the rule “creates a risk that two otherwise similarly situated meritorious whistleblowers whose tips led to comparably successful Commission and related actions would receive meaningfully different awards based solely on the award program to which the actions in question were more directly related or relevant.”¹¹ We commend the Commission for its acknowledgement that this “disparate treatment” is “needlessly unfair” and is contrary to the statutory commands of the Exchange Act.¹²

C. 2022 Proposed Amendments to Whistleblower Program Rules

NWC is pleased the Commission is seeking to fix the Multiple-Recovery Rule to avoid the unfair situation in which a qualified whistleblower is subjected to a diminished award recovery due to the existence of an alternative whistleblower program that offers substantially weaker incentives and protections.

The principal proposal under consideration is the Comparability Approach, in which “the Multiple-Recovery Rule would not apply if the maximum potential award that the other program could grant in connection with a related action would be meaningfully lower than the maximum amount the Commission could award to that whistleblower on that same action.”¹³ This would mean that the alternative whistleblower program “does not have an award range or award cap that would restrict the total maximum potential award from that program to an amount that is

¹⁰ *See Id.*

¹¹ *Proposed Rulemaking, supra* note 1 at 9284.

¹² *Id.*

¹³ *Id.* at 9282.

meaningfully lower than the maximum potential award to all eligible claimants (in dollar terms) that the Commission could make on the particular action.”¹⁴

NWC supports the Comparability Approach proposed by the Commission. The Comparability Approach incorporates some of our prior recommendations for amending the Multiple-Recovery Rule. Such recommendations included:

- Requesting the Commission to confirm that the 10-30% award range for related actions is an undisputed Congressional directive and will be followed in all related action cases where a law does not meet the same standards as does the Dodd-Frank Act (i.e. confidentiality; non-discretionary awards within the 10-30% range; juridical review of any denials; and no caps below 30% of a sanction).
- Requesting that the Commission not apply the Multiple-Recovery Rule in circumstances where the criterion for paying an award is substantially different between the sister federal or state agency and the SEC. In such a circumstance, the Commission may apply its criteria to the award and issue a related action award no larger than 30% (combining all awards provided to the whistleblower.)¹⁵

NWC believes that the Comparability Approach proposed by the Commission strikes the appropriate balance between ensuring that qualified whistleblowers are not subjected to a diminished award due to a weaker alternative whistleblower program while also limiting the ability of whistleblowers to obtain a double recovery in a related action.

II. NWC Supports Proposed Amendment to Exchange Act Rule 21F-6 regarding the consideration of dollar amounts in large awards.

Rule 21F-6 sets forth various factors the Commission may consider in determining the size of an award. When enacting the 2020 Amendments to the whistleblower program, the Commission asserted that it had the discretion to consider the dollar amount of an award when making an award determination.¹⁶ In other words, the Commission could lower an award determination simply due to the large size of the potential award—even if the circumstances of the particular enforcement action nor the conduct of the whistleblower justified lowering the award.

During the 2020 whistleblower rulemaking process, NWC submitted numerous objections to the proposed limitation on award determinations based on award size and offered the following arguments:

¹⁴ *Id.* at 9285.

¹⁵ See Eleventh Supplemental Comment on Proposed Rule 21F-3(b)(4), File Number S7-16-18, Kohn, Kohn & Colapinto, LLP (Sept. 10, 2020), <https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/09/KKC-ELEVENTH-SUPPLEMENTAL.pdf>.

¹⁶ See, e.g., Adopting Release, 85 FR 70909-10 (“The Commission has had and continues to have broad discretion in applying the Award Factors and setting the Award Amount, including the discretion to consider and apply the Award Factors in percentage terms, dollar terms or some combination thereof.”); *id.* at n.102 (“When applying the award factors specified in Rule 21F-6 and determining the award dollar and percentage amounts set forth in the preliminary determination, the award factors may be considered by the SEC staff and the Commission in dollar terms, percentage terms or some combination thereof.”).

- Putting a cap on rewards will only deter whistleblowers from coming forward.
- High rewards increase the likelihood that more whistleblowers will come forward to the SEC with their information.
- Whistleblower rewards encourage companies to create robust internal compliance programs. Bolstering compliance programs aligns with the mission of the SEC as they prevent fraud from occurring in the first place. Large whistleblower rewards give employers a reason to create a transparent work environment and to be encouraging of employee internal disclosures.
- Congress required the Commission to consider the deterrence effect of an award when weighing how large of an award to pay. 15 U.S.C. § 78u-6(c)(1)(B) (“In determining the amount of an award made under subsection (b), the Commission . . . shall take into consideration . . . the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that led to the successful enforcement of such laws.”). Placing limits on whistleblower rewards solely due to the large size of the potential reward undermines the deterrent effect of the whistleblower program.
- Lowering awards simply on the basis of size is inconsistent with the plain meaning of the statute and undermines the existing criteria established by Congress for increasing the percentage of a sanction obtained based on important market behaviors that serve the long-term interest of investors. A rule that permits arbitrary reductions based on the size of an award is counter to the public interest, would discourage whistleblowers from coming forward, and would undermine existing incentives for desired behaviors when a whistleblower reveals a large fraud, and for these reasons the current rule should be amended to eliminate award caps based on award size.¹⁷

NWC is pleased that the Commission’s proposed amendments to Rule 21F-6 directly address these concerns. Under the Commission’s proposal, a new paragraph (d) would be added to Rule 21F-6 providing that: (1) the Commission “shall not” use the dollar amount of a potential award when applying the factors specified in paragraphs (a) and (b), or in any other way, to lower a potential award; and (2) new paragraph (d) would provide that the Commission may consider the dollar amount of a potential award for the limited purpose of increasing the award amount.

NWC’s original comments during the 2020 rulemaking initially proposed eliminating entirely the Commission’s discretion to alter award determinations based on the award amount.¹⁸

¹⁷ Comments Regarding Proposed Rule File Number S7-16-18, Whistleblower Program Rules, National Whistleblower Center (Sept. 18, 2018), <https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2019/10/s71618-4371152-175237-2.pdf>.

¹⁸ *See Id.*

Alternatively, we requested that the Commission clarify that whistleblowers in large cases, who meet the criteria for enhanced rewards, will not be prejudiced simply based on the size of a sanction. In other words, the criteria in section 21F-6(a) should be fully applicable in large cases, and the Commission should grant the maximum award of 30% in large cases, when justified under the current criteria in 21F-6(a). However, NWC believes that the Commission's current proposal adequately addresses the concerns stated above.

NWC commends the SEC for its commitment to the whistleblower program, and we urge the Commission to swiftly enact the proposed amendments. NWC would be happy to meet to further discuss our support for these amendments and why it is so critical that whistleblowers have the confidence of knowing their cooperation across agencies will be robustly rewarded rather than penalized. Please contact us at info@whistleblowers.org with any questions we would be happy to clarify or develop on anything in this letter.

Respectfully submitted,

/s/
Siri Nelson
Executive Director
National Whistleblower Center

CC:

Chair Gary Gensler
Commissioner Allison Herren Lee
Commissioner Hester M. Peirce
Commissioner Caroline A. Crenshaw
Chief of Whistleblower Office, Kelly, N. Creola